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Nos. 98-371
98-5899

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997-1998

D.R. HILL, Warden, et al., Petitioners,

v.

TOUFIC BADIH NADDI, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Respondent's Brief In Opposition To Petition For Writ Of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

I. Should this Court exersice its descretion to grant review, where the matter involves clearly settled issues of law?

II. Should this Court exercise its discretion to grant review to detrmine whether a "structural error" is subject to harmless-error analysis?

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REASONS WHY THE PETITION SHOULD BE DENIED

I. **This Court Should Deny Petitioners' [State] Petition for a Writ of Certiorari Because The Question of Whether a Defendant Who is Competent to Stand Trial is Also Competent to Waive the Right to Counsel is Clearly Settled Law** (Sup Ct R. 10 (d)).

The United States Court of Appeals for the Ninth Circuit has correctly affirmed the district court's order granting the writ of habeas corpus based on the claim that respondent [Naddi] was denied his right to self-representation under the Sixth Amendment to the United States Constitution. The Ninth Circuit relied on Godinez v. Moran, 125 L Ed 2d 321 (1993), for the proposition that there is no distinction between competency to stand trial and competency to waive counsel. See State's Appendix at p. A-82.

The State's argument is contradictory because it concedes, on the one hand, that a defendant who is competent to stand trial is also competent to waive counsel, but, on the other hand, requests that the trial court should be permitted to conduct a separate psychiatric hearing to determine whether the defendant is competent to waive counsel.See Petition at p. 7-8. In addition to the State's mistatement of the law, it mistates the facts.

Here, the Ninth Circuit affirmed the district court because the trial judge, relying upon Currry v. Superior Court, 75 Cal App 3d 221 (1977), limited his waiver inquiry to the opinions of six

psychiatrists on whether Naddi was "free of mental disorder which would so impair his free will that his decision to waive counsel would not be voluntary." 18 R.T. [2-8-88] 532. Three psychiatrists opined that Naddi's waiver was based on paranoid delusion that his wife's family and the district attorney had corrupted his attorneys. 17 R.T. [2-4-88] 435-46 (Dr. Duff); id. at 442-44, 526 (Dr. Klatte); 18 R.T. [2-8-88] 597 (Dr. Rappaport). Three opined that Naddi's waiver was based not upon delusion but rather upon culture, misperception, or disagreement with counsel over the conduct of his defense. See id. at 534 Dr. Vargas); id. at 539 (Dr. Hansen); 19 R.T. [2-9-88] 855-88 (Dr. Sharma). Based on these opinion alone, the trial judge found that Naddi lacked the capacity to make a valid waiver.

The district court found that the trial judge applied the wrong legal standard. Curry relied upon the now-debunked theory that 'a distinction exists between competency to stand trial and copetency to make a knowing and intelligent waiver of the right to counsel.' Curry, 75 Cal App 3d at 227. In his ruling on Naddi's request to represent himself, the trial judge expresses sole reliance on Curry, and phrases his inquiry in terms of "whether Mr. Naddi is Competent to waive his right to counsel." 21 R.T. [2-8-88] 969. This is an error. See Moran v. Godinez, 57 F 3d 690, 698 (9th Cir. 1994). ("Because the two standards are identical, one finding of incompetence suffices for both."), cert. denied sub nom. Moran v. McDaniel, 116 S. Ct. 479 (1995). The jury's determination that Mr. Naddi was competent to stand

trial necessarily meant that he was competent to waive counsel: the issue was whether he had "knowingly and voluntarily entered his waiver." See State's Appendix at A-72-73.

The district court found that the trial, judge O'rourke, conducted absolutely no inquiry of whether Naddi had knowingly and voluntarily entered his waiver. Therefore, the district court found the record insufficient to answer the proper and sole required inquiry of whether Naddi understood the "nature of the charges against him, the possible penalties, and the dangers and disadvatages of self-reresentation," and was not making his waiver as a product of outside coersive forces." Accordingly the district court concluded, and the Ninth Circuit affirmed, that the rejection of Naddi's waiver of his right to counsel was error which automatically requires reversal of his conviction. See the State's Appendix at A-73; A-82-83.

As for the approach taken by the Eighth and Eleventh Circuits in United States v. Cash, 47 F 3d 1083, 1088(11th Cir. 1995); Wilkens v. Bowersox, 145 F 3d 1006 (8th Cir. 1998),[*1] for the proposition that a defendant's mental health is an appropriate consideration when a court determines whether a waiver of the right to counsel is knowing and voluntary, both Circuits have misapplied Godinez because they require that a defendant waiving the right to counsel to have greater power of comprehension, judgment, and reason than would be necessary to stand trial with the aid of an attorney. For example, in United States v. Cash, 47 F 3d 1083, the Eleventh Circuit enumerated factors to be considered when determining whether a record establishes a knowing , voluntary,

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[*1] The facts are identical to those in Godinez,supra, at 327,328.

and intelligent waiver. Among other things, the defendant's education; physical and mental health; understanding of rules of procedure and evidence; experience in criminal trials. Petition 7-9.

This Court has rejected the argument that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights. Godinez at 332. It was further emphasized that the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself. In Farettta v. California, 45 L Ed 2d 562, it was held that a defendant choosing self-representation must do so "competently and intelligently," but we made it clear that the defendant's "technical knowledge" is not relevant to the determination whether he is competent to waive his right to counsel..., and we emphasized that although the defendant may conduct his own defense ultimately to his own detriment, his choice must be honored. Godinez at 332-333.

A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to ... waive his right to counsel. In addition to detrmining that a defendant who seeks to waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional right is knowing and voluntary... the focus of the "knowing and voluntary" inquiry ... is to determine whether the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." Godinez at 333.

In other words, a defendant waiving counsel must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open." Godinez at 333 fn. 12.

In short, because the legal issue of whehter psychiatric evidence is required to determine the waiver of counsel is settled law, this Court should not grant review.

II. This Court Should Deny Review, Where the Issue of Whether Self-representation is a "Structural Error" Which Defies Analysis by harmless-error standard has been clearly settled law

This Court has, contrary to the State's argument, put forth a persuasive rationale why a reversible per se rule applies when a defendant is precluded from self-representation. The question simply turns on whether the error is a "trial error" or a "structural error". This Court explained:

> "Trial error occurs during the presentation of the case to the jury, and is amenable to harmless-error analysis because it may be quantitatively assessed in the context of other evidence presented in order to determine the effect it had on the trial... At the other end of the spectrum of constitutional errors lie structural defects in the constitution of the trial mechanism, which defy analysis by harmless-error-standards ...the existance of such defects- deprivation of the right to counsel, for example, requires automatic reversal of the conviction because they infect the entire trial process." Brecht v. Abrahamson, 123 L Ed 2d 353, 367.

In this case, the deprivation of the right to self-representation has been classified as a sturctural defect in the constitution of the trial mechanism. See McKaskle v. Wiggins, 465 U.S. 168, 177-78. Therefore, it defies analysis by harmless-error

standard and reversible per se rule applies. See Arizona v. Fulminante, 499 U.S. 279 at p. 331 (1991). In addition, the district court found that "whatever Naddi chooses to do with his right today, he may not be confined on the basis of a proceeding rendered illegitimate by a structural error...(structural error infects entire process and requir automatic reversal.) See State's Appendix at A-79.

As for the State's argument that "the anomaly of trying a criminal defendant because he was prejudiced by being compelled to be defended by competent counsel is particularly evident in Naddi's case. The evidence of Naddi's guilt was overwhelming... the only issue of consequence was whether Naddi was sane at the time he committed the murders...having avoided the death penalty ...Naddi was hardly prejudiced by capable representation afforded him.." State's petition at 10-11.

What is anomalous , in the state's argument, is the fact that it does not mention how Naddi was capably represented in the sanity ~~phase of~~ the trial which is "the only issue of consequence", but moves out of order to the penalty phase and defend the capable representation afforded to Naddi when his life was saved. To start with the penalty phase, this is not a death penalty case by any stretch of the imagination. This is a case of humbly educated man who has never done anything wrong in his life. A loving father whose actions were ordained by God to protect his two innocent children from being kidnapped and molested by a known child molester and his body guards.On the other hand, if the child molester was not coming to kidnap and molest Naddi's innocent

children, then neither the capable representation nor anything else could or should save Naddi's life. Indeed, the State does not offer a single example of any exraordinary performance afforded to save Naddi's life. There is none.

Turning backwards to the sanity phase, the quality and quantity of representation offered to Naddi is illustrated by the last two attorneys appointed.*2 In this case, there are two double jeopardy violations and two ineffective assistance of counsel claims which are presently before this Court and which are related to the only "issue of consequence" in this case.

The first double jeopardy violation occurred in the second sanity phase trial when the prosecutor provoked a mistrial to save his case through a racially biased closing argument and at the time the jury could have easily returned with a verdict of not guilty by reason of insanity. See Naddi's Petition for writ of certiorari, Argument I.

The second double jeopardy violation occurred in the third sanity phase trial when the two defense attorneys successfully obtained a mistrial over Naddi's objection and opposition of the people. See Naddi's Petition, Argument III.

Based on the above double jeopardy violations, any inquiry will

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*2 The trial court appointed two attorneys because it was a death penalty case. The number of attorneys appointed or Naddi's dissatisfaction with them is not an issue before this Court. Suffice to say that the trial court relieved or accepted the withdrawal of several attorneys for the busy schedule or for conflict of interest, among other reasons.

reveal that a different result would have been obtained had Naddi been represented by competent counsel. Any reasonably competent attorney would have raised a valid plea of once in jeopardy based on the prosecutor provoking a mistrial through a racially biased argument and at the time the jury could have easily returned with a verdict of not guilty by reason of insanity. See Naddi's Petition, Argument II.

Most certainly, a different result would have been obtained as a matter of law if Naddi were allowed to represent himself in the third sanity phase trial. Naddi and the prosecutor were satisfied with the jury empeneled. It was the defense attorneys' action that caused the improper dismissal of the jury empaneled. As a result, Naddi was denied his constitutionally protected right to the jury empaneled and an opportunity, after years of anxiety, expense, and ordeal, to end the dispute then and there, perhaps, with an acquittal. See Naddi's Petition, Argument IV.

Accordingly, any remand to the trial court, after over thirteen years of subjecting Naddi to trials and appeals, should be to dismiss the case due to the improper denial of the right to self-representation. This denial, prejudiced Naddi and destroyed his chances, complicated the issues, and caused obvious double jeopardy violations.

The Ninth Circuit also correctly found that the record shows that Naddi did knowingly and voluntarily waive his right to counsel and the State does not offer any changing circumstances to set side this finding. Indeed, the only circumstances offered by the State is that, after the first competency hearing, Naddi had been consistently

found competent to stand trial. See State's Petition at 4-5.

In addition, the record shows that the State advocated Naddi's position during the trial. The State took an extraordinary step of filing a petition for a writ of mandate in the Fourth District Court of Appeals, Division One, claiming that Judge O'Rourke had improperly suspended the criminal proceedings because there was insufficient evidence for doubting Naddi's competency, that the appointment of attorney Murphy was improper becase he was biased against Naddi..., and that Judge O'Rourke's conduct had a chilling effect upon Naddi's Faretta right of self-representation. The Petition specifically alleged that Judge O'Rourke lacked substantial evidence to initiate a re-examination of Naddi's pro per status. (Court of Appeal No. D007204,Mandate Petition pgs. 3,4,19,28).

CONCLUSION

For the foregoing reasons, the State's Petition for a Writ of Certiorari should be denied.

Dated: 9-25-1998

Respectfully submitted

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v.

TOUFIC BADIH NADDI, -Respondent.

PROOF OF SERVICE

I, TOUFIC BADIH NADDI, do swear or declare that on this date, 9,25 ,1998, as required by Supreme Court Rule 29 I have served the enclosed Respondent's Brief In Opposition To Petition For Writ Of Certiorari on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

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I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

Executed on 9,25 , 1998

Toufic Naddi

Signature